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No. 76-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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STATUTES AND REGULATIONS INVOLVED

Sections 61 and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and the relevant portions of Treasury Regulations, Sections 1.61-2 and 1.119-1 (26 C.F.R.) are set forth in the Appendix hereto, pp. 1A-7A.

QUESTION PRESENTED

Whether a noncompensatory cash meal allowance paid to a state police trooper for the convenience of his employer is includible in his gross income under the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

In 1970, the year in issue, respondent[1] was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter "State Police"). He originally enlisted in the State Police in August 1960 and reenlisted in 1962 and 1964. During his second term he received tenure, and at all times after his original enlistment he was a trooper in good standing with the State Police. (Pet. App. A, pp. 2A-3A.)

The State Police, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments. (Pet. App. A, p. 3A.)

The executive and administrative head of the State Police is the Superintendent of State Police (hereinafter "Superintendent"). He is appointed by the Governor of the State of New Jersey. The Superintendent, with the approval of the Governor, makes all rules and regulations for the operation, control and discipline of the State Police, which is organized along military lines. The Superintendent is authorized to provide for the commutation of rations (hereinafter "meal allowance") and quarters to those members of the State Police not provided with rations and quarters by the State. (Pet. App. A, p. 3A.)

Below the Superintendent, who holds the rank of colonel, is the Deputy Superintendent who has the statutory rank of major. The remainder of the State Police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the State Police, of whom approximately 900 were troopers. (Pet. App. A, p. 3A.)

1. References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year in issue.

Prior to July 1949, all troopers were supplied with meals at meal stations located throughout New Jersey at the expense of the State. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the State. Despite various efforts at enforcing the meal station system, it proved unsatisfactory. Each trooper would have to leave his patrol area unguarded for approximately an hour and a half to enable him to travel to his meal station, to eat his meal and to return to his post. Efforts aimed at staggering eating periods proved unworkable and drew complaints from those in charge of the meal stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the State discontinued its meal station operations and, instead, instituted a meal allowance system. (Pet. App. A, pp. 3A-4A.)

This system provided for a daily meal allowance for all members of the State Police while they were on active duty. In 1970 the annual meal allowance rate for troopers was $1,704[2] and this amount was paid without adjustment except for leave for military training. All troopers were entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty, but their salaries increase with their length of service. (Pet. App. A, pp. 4A-5A.)

Meal allowances and troopers' salaries are separately accounted for in the State Police's accounting system. Funds are never commingled between the salary account and the meal allowance account. The meal allowance is paid biweekly in advance and the salaries are paid biweekly in arrears. These amounts are separately stated on the troopers' biweekly checks. (Pet. App. A, p. 4A.)

2. Although respondent was entitled to $1,704 in meal allowance money, he received only $1,697.54. This slight difference is not relevant. (Pet. App. A, p. 4A, n.2.)

The meal allowance system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation. (Pet. App. A, p. 5A.)

Under the meal allowance system the troopers are expected to eat at a public eating place within their assigned patrol area. Before eating, a trooper must first check in with the officer in charge of his station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating. A trooper is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept free meals. (Pet. App. A, p. 5A.)

Respondent was required to keep a record of his activity for each 24-hour period. Based on these records respondent spent 200 nights away from home on active duty. Respondent spent the entire amount of his meal allowance for meals while on active duty. (Pet. App. A, p. 7A). No restrictions are placed on a trooper's use of his meal allowance. A trooper may eat at home if it is within his assigned patrol area and if he receives permission to do so, or he may bring his own meal and eat in or near his patrol car. The meal allowance is not calculated to provide reimbursement for any specific number of meals, nor is a trooper required to account to the State for his meal expenses. (Pet. App. A, p. 5A.)

State Police recruits are told that, in addition to their salary, a meal allowance will be paid to them in cash, which is in lieu of the State's furnishing meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the State and the troopers' union. (Pet. App. A, p. 5A.)

A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned. It is the policy of the State Police to give every man a broad scope of experience by giving him various assignments as operations permit, and during 1970 respondent had several different assignments. (Pet. App. A, p. 6A.)

Respondent reported $9,066 in wages and salaries on his 1970 federal income tax return. This amount included his base salary of $8,739.38 and meal allowance of $326.45[3]. He did not include the remaining $1,371.09 of meal allowance in the tax return. Respondent claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Petitioner disallowed this deduction, determining that the meal allowance funds were includible as gross income under Section 61 of the Code, and calculated a deficiency of $69.54. (Pet. App. A, pp. 7A-8A.)

Subsequently, after respondent had filed his petition in the Tax Court and after petitioner had answered, petitioner discovered that the remaining $1,371.09 of meal allowance funds received by respondent in 1970 was not included in respondent's tax return. Petitioner filed an Amendment to Answer of respondent's Petition in the United States Tax

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3. Prior to October 1, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the State began to deduct and withhold the appropriate amounts after correspondence and discussions with the Commissioner of Internal Revenue. Consequently, only $326.45 of respondent's meal allowance was included on his Wage and Tax Statement (Form W-2) for the year 1970. (Pet. App. A, p. 7A, n.3.)

4. Although there is a minor difference between the meal allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by respondent, petitioner does not dispute the correctness of the amount claimed as a deduction. (Pet. App. A, p. 8A, n.4.)

Court, to the filing of which respondent did not object, determining that this amount should also be included in gross income. Petitioner accordingly increased the deficiency to $330.70, all of which came into dispute. (Pet. App. A, p. 8A.)

The United States Tax Court held that the meal allowance was includible in income under Section 61 of the Code and was not excludable from income under Section 119 of the Code, but that respondent was entitled to deduct part of the allowance as an expense under Section 162 of the Code. (Pet. App. A, pp. 8A-26A.) The opinion was reviewed by the full Tax Court, and seven judges dissented, including the trial judge, Judge Sterrett, who wrote the principal dissenting opinion. (Pet. App. A, pp. 32A-37A.)

Judge Sterrett (joined by five other judges) dissented on the ground that the meal allowance did not constitute gross income under Section 61 of the Code because, under the long-standing judicial and administrative "convenience of the employer" doctrine, respondent had shown "that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid." (Pet. App. A, p. 37A.)

The United States Court of Appeals for the Third Circuit reversed *per curiam* on the basis of its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), and on the basis of Judge Sterrett's dissenting opinion in the Tax Court. (Pet. App. B, pp. 38A-41A.) Judge Sterrett's opinion did not reach the issues raised under Sections 119 and 162 of the Code.[5]

5. Thus, the questions raised in the Tax Court under Section 119 were not fully considered by the court of appeals, and the questions raised under Section 162 (as to which the respondent, but not the petitioner, appealed) were not considered at all by the court of appeals.

SUMMARY OF ARGUMENT

This case presents the question of the proper federal income tax treatment to respondent, a New Jersey State Police trooper, of a noncompensatory meal allowance, in commutation of rations, provided by the New Jersey State Police for its own convenience.

The New Jersey State Police, respondent's employer, required him to be on duty as a trooper 24 hours a day, 365 days a year. His active duty consisted of long, irregular hours. In 1970, the year in issue, he spent approximately 200 nights at police barracks or in field assignments, and he was on call at all other times.

For many years, the State of New Jersey served meals to its troopers at designated meal stations maintained by the State. This system resulted in inadequate police coverage of the State during mealtimes. Therefore, the State, in 1949, for its own convenience, replaced the meal stations with a noncompensatory meal allowance, so that New Jersey could have full police coverage at all times and at the same time eliminate the expense of maintaining meal stations. The State has always accounted separately for the meal allowance.

The respondent spent at least the total amount of his meal allowance for meals while on active duty.

The respondent's meal allowance does not constitute gross income under the long established convenience of the employer doctrine embodied in Section 61 of the Internal Revenue Code because it was not compensation for services, but rather a subsistence allowance provided for the employer's convenience in lieu of rations required during active police duty. The tax law has long recognized an exclusion from gross income for meals and meal allowances if they are both *noncompensatory* and *provided for the convenience of the employer*. The legislative history of the

Internal Revenue Code of 1954 and the Treasury Regulations promulgated thereunder recognize the validity of this exclusionary doctrine, which is the only basis on which the subsistence and quarters allowances paid to hundreds of thousands of personnel in the armed forces are excluded from their gross income. It is immaterial whether payment is in cash or kind and it is immaterial that incidental personal needs of the employee may also be satisfied. The respondent's meal allowance falls squarely within the scope of this exclusionary doctrine, as the court of appeals held, following its own decision under the Internal Revenue Code of 1939 in *Saunders* v. *Commissioner*, 215 F.2d 768 (3d Cir. 1954). The exclusionary doctrine has not been eroded by the enactment in 1954 of Section 119 of the Code, which provides a specific exclusion from gross income for the value of meals and lodging furnished for the convenience of the employer on the employer's business premises *even if* the meals and lodging are compensatory. Nor has any decision of this Court cast doubt on the validity of the doctrine.

Although the court of appeals reached its decision that the meal allowance did not constitute gross income by analysis of Section 61, the petitioner raises the further argument that the meal allowance is not specifically excluded from gross income under the provisions of Section 119. In response to this argument, it is the respondent's alternative position that the meal allowance in this case meets all the requirements of that Section since: (i) the allowance, having been spent entirely on meals, constituted the value of meals in commutation of rations; (ii) the allowance was furnished by respondent's employer; (iii) the allowance was furnished for the convenience of the employer because the State provided better police protection at less expense than under the former system of meal stations; and (iv) the respondent received his meals on the business premises of the employer because the jurisdiction of the State Police is statewide.

ARGUMENT

I.

THE MEAL ALLOWANCE PAID TO A NEW JERSEY STATE POLICE TROOPER BY HIS EMPLOYER DOES NOT CONSTITUTE GROSS INCOME BECAUSE IT IS BOTH NONCOMPENSATORY AND PAID FOR THE CONVENIENCE OF THE EMPLOYER.

This case presents a question of statutory construction with respect to the meaning and content of the term "gross income" in the context of the Internal Revenue Code of 1954. The computation of gross income is the first step in the computation of taxable income upon which the federal income tax is imposed. Thus, the inquiry is as to the intent of Congress to include the respondent's meal allowance as an item of gross income.

The first guide to the Congressional intent is what Congress enacted: the statute itself. Initially, the content looks broad, for in Section 61 of the Code (App. p. 1A) "gross income" is defined as "all income from whatever source derived, including (but not limited to) . . . (1) Compensation for services, including fees, commissions, and similar items. . . ." The statute therefore limits "gross income" to items of "income", thereby recognizing that a taxpayer may have items of gross receipts that are not items of income. Congress has long been aware that some gross receipts might not constitute "income", for there is a whole grouping of provisions (Sections 71 through 84) entitled "Items specifically included in gross income," relating to matters such as alimony (Section 71), prizes and awards (Section 74) and reimbursements of moving expenses (Section 82). These provisions would be surplusage under the petitioner's view (Pet. Br. p. 13) that Congress intended Section 61 to tax all receipts except those specifically exempted. Moreover, under the petitioner's view, gross income derived from business would be the same as gross receipts, contrary

to the long-established principle, now embodied in Treas. Reg. Section 1.61-3, that in a business context ". . . 'gross income' means the total sales, less the cost of goods sold. . . ." Thus, it is apparent that "gross income" is not a concept susceptible of simple definition.

The Treasury Department itself has recently acknowledged the complex nature of the Internal Revenue Code's definition of gross income in a Treasury Department document entitled "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," 1976 CCH Stand. Fed. Tax Rep. ¶8907, P-H 1976 Fed. Taxes ¶65,667, (Office of the Assistant Secretary for Tax Policy, September 2, 1975), which states:

> "With the definition of 'income'—as in the case of other broad concepts such as 'due process' or 'equal protection'—most of the law must be discovered in a study of the ways in which the language has been interpreted." 1976 CCH Stand. Fed. Tax Rep. ¶8907, at p. 77,371.

Accordingly, in order to discover whether Congress intended the respondent's meal allowance to be characterized as an item of "income" to be included within the definition of "gross income," it is necessary to examine the ways in which this language has been interpreted—legislatively, judicially and administratively.

A. Under the long established convenience of the employer rule, the gross income of an employee does not include a subsistence allowance paid to him by his employer if (i) the allowance is non-compensatory and (ii) the allowance is paid for the convenience of the employer.

It has long been established that the gross income of an employee does not include everything of value received by the employee from his employer, since not everything constitutes compensation for services. Congress has recog-

nized this principle in Sections 101, 105, 106, 107, 112, 113, 117 and 119 of the Code. Such specific exclusions are not exhaustive. See *Rudolph* v. *United States*, 370 U.S. 269, at 274 (1962).

The courts have also long agreed that not everything of value received by an employee from his employer represents income. See *e.g.*, *Jones* v. *United States*, 60 Ct. Cl. 552 (1925) (quarters allowance for Army officer); *Bercaw* v. *Commissioner*, 165 F.2d 521 (4th Cir. 1948) (quarters allowance for Army officer); *Saunders* v. *Commissioner*, 215 F.2d 768 (3d Cir. 1954) (meal allowance for state police); *Diamond* v. *Sturr*, 221 F.2d 264 (2d Cir. 1955) (food and lodging to employee while on duty at mental institution); *United States* v. *Barrett*, 321 F.2d 911 (5th Cir. 1963) (meal allowance for state trooper); *United States* v. *Gotcher*, 401 F.2d 118 (5th Cir. 1968) (expense paid trip to Germany); *Benaglia* v. *Commissioner*, 36 B.T.A. 838 (1937), *appeal dismissed*, 97 F.2d 996 (9th Cir. 1938), (meal and lodging for hotel manager); *Cavanagh* v. *Commissioner* 36 T.C. 300 (1961) (reimbursement for food and lodging incurred because of move). All of the cited cases reach their conclusion—that the item of value was not income to the recipient—by analysis of Section 61 or its predecessor, Section 22(a) of the Internal Revenue Code of 1939, and *not* by reliance on any specific exclusionary provision of the Code.

Even the petitioner himself has long agreed to this principle in his rulings and regulations. In fact, it was the petitioner who first established the principle, and it was established in the very same context as the present case —meals. It has been long established that gross income does not include the value of meals or lodging provided to an employee by his employer if the meals or lodging are provided *for the convenience of the employer and not as additional compensation to the employee.*

The origin of this convenience of the employer rule dates back to the early years of the income tax. In 1919, the

Bureau of Internal Revenue ruled that the board and lodging of seamen were furnished for the convenience of the employer and, therefore, were not includible in the gross income of the seamen. O.D. 265, 1 Cum. Bull. 71 (1919). In 1920, the Bureau extended the convenience of the employer rule in O.D. 514, 2 Cum. Bull. 90 (1920):

> "'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee."

The quoted ruling established early and clearly that it is immaterial whether the value of a meal is provided in cash or in kind, as long as the meal is not compensatory and is provided for the convenience of the employer. It should be noted that O.D. 514, *supra,* which has been in full effect for more than half a century, does *not* require that the employee actually spend the supper money for supper.

The convenience of the employer rule was first embodied in the income tax regulations in 1920. T.D. 2992, 2 Cum. Bull. 76 (1920). The rule was developed administratively over the years prior to the enactment of the Internal Revenue Code of 1954 in a number of rulings and regulations. See the discussions in *Saunders* v. *Commissioner, supra,* and in Gutkin and Beck, *"Some Problems in 'Convenience of the Employer'"*, 36 Taxes 153 (1958). See also Jordan, *"Can cash payments to employees be excluded as meals under Section 119?,"* 45 J. Tax. 310 (1976).

The first judicial recognition of the convenience of the employer rule occurred in *Jones* v. *United States, supra.* In that case, an Army officer, who had been required to live in government quarters for the first part of his taxable year, was transferred for the latter part of the taxable

year to a new post where government quarters were not available. For the latter part of the year, the government paid him a cash allowance in commutation of the quarters. The court held that neither the value of the government quarters nor the cash allowance in commutation of quarters constituted income, since neither was intended as or paid as additional compensation and since the occupancy of government quarters by the officer was a requisite to the proper performance of his duties.

The rationale of the *Jones* decision was incorporated and expanded in the income tax regulations. It is now included in Treas. Reg. Section 1.61-2(b), which provides in relevant part as follows:

> *"Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income."

It is significant that this Regulation is promulgated under Section 61, which defines gross income. *There is no specific statutory exclusion for amounts received by military personnel as commutation of rations and quarters.* Thus it is clear that cash allowances may qualify for exclusion from gross income. It is also significant that the Regulation extends to the Public Health Service, even though it is a part of the Department of Health, Education and Welfare rather than part of the military.[6] See 42 U.S.C.

6. Moreover, the Regulation extends to the Coast and Geodetic Survey, even though it is not one of the "uniformed services" as that term is defined by 37 U.S.C. Section 101(3).

Section 202. Furthermore, the rule of the quoted Regulation has been extended by a ruling to the National Guard (Rev. Rul. 60-65, 1960-1 Cum. Bull. 21), even though the National Guard, like the State Police, is an arm of the state. See 32 U.S.C. Section 101(3), (4) and (6).

By 1950, the convenience of the employer rule had evolved so as to be applied administratively:

> "... only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered." Mim. 6472, 1950-1 Cum. Bull. 15.

Thus, on the eve of the consideration and enactment of the Internal Revenue Code of 1954, it was the position of the Bureau of Internal Revenue that the convenience of the employer rule was not to be applied in situations where the employee's receipt of benefits was compensatory. In this context, Congress enacted the present Section 119 (App. p. 2A) as part of the Internal Revenue Code of 1954. Section 119 excludes from an employee's gross income the value of meals provided to him by his employer for the convenience of the employer on the business premises, whether or not compensatory.

While Section 119 was the first specific legislative inclusion of the convenience of the employer doctrine, it was not intended to preempt the field. The purpose of Section 119 was to carve out a safe harbor where the value of meals and lodging furnished for the convenience of the employer would be excluded from the gross income of the employee for income tax purposes *even if* the meals and lodging were compensatory. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 19 (1954). The Senate Finance Commitee Report stated:

> "Under section 119 as amended by your commitee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation."
>
> "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income *to the extent that* such allowances constitute compensation." S. Rep. No. 1622, 83d Cong., 2d Sess. 190-191 (1954). (Emphasis added.)

See also Rev. Rul. 59-307, 1959-2 Cum. Bull. 48, following *Boykin* v. *Commissioner*, 260 F.2d 249 (8th Cir. 1958).

From the foregoing it is clear that Section 119 was not intended to displace what has been described as the "common law 'convenience of the employer' test." 1 Surrey *et al., Federal Income Taxation*, 130 (1972). The regulations under Section 119 also recognize the non-exclusivity of that section. Treasury Regulation Section 1.119-1(c)(2) provides in relevant part as follows:

> "The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. . . . Cash allowances for meals or lodging received by an employee are includible in gross income *to the extent that* such allowances constitute compensation." (Emphasis added.)

Thus, under both the Senate Finance Committee Report and the Treasury Regulations, meal allowances paid in cash for the convenience of the employer are includible in gross income *only if* they are compensatory. See Rev. Rul. 60-65, *supra*, for another administrative recognition of the continued vitality of the convenience of the employer doctrine of exclusion from gross income.

The petitioner's inference (Pet. Br. p. 26) from the enactment in 1954 and repeal in 1958 of former Section 120 illustrates his failure to understand the convenience of the employer rule. Section 120 allowed police officers to exclude from gross income up to $5 per day received as a statutory subsistence allowance, whether or not the allowance was paid for the convenience of the employer. Since there was no requirement (i) that this allowance be noncompensatory or (ii) that it be paid for the convenience of the employer, Section 120 was wholly outside the realm of the convenience of the employer doctrine. The enactment and repeal of Section 120, therefore, were irrelevant to the doctrine.

More recently, the Treasury Department has reaffirmed the common law nature of the Code's definition of gross income by stating in "Fringe Benefits; Notice of Publication of Discussion Draft of Regulations [under Code Section 61]," 40 Fed. Reg. 41118 (September 5, 1975):

> "The Internal Revenue Code does not provide special rules for determining which economic benefits provided to employees by their employers are required to be included in gross income."

This common law approach is reinforced in the Treasury's "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," *supra,* which states:

> ". . . [O]fficial interpretations outstanding for decades hold that such things as travel passes for railroad employees or supper money for employees who work overtime are not to be included in income." 1976 CCH Stand. Fed. Tax Rep. ¶8907, at p. 77,371.
>
> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'," Id. at p. 77,375. (Emphasis in the original.)

> "The statutory definition of income is very broad. That broad scope provides the residual authority to deal with new forms of compensation and other income generally as they develop without having to amend the statute each time. Inherent in that authority is the flexibility and, indeed, the necessity to distinguish between economic benefits which should be taxed and those which should not." Id.
>
> "[M]any high-income persons, particularly those whose business and personal lives are in effect melded, enjoy major economic benefits in the form of meals, lodging, travel and entertainment, much of which goes untaxed under rules that are statutory. When this is occurring in so widespread a fashion, it seems particularly unfair, for example, to tax ordinary airline employees for traveling in otherwise empty seats or to tax retail clerks for discounts received on goods purchased from their employer." Id.

Or, it may be added, *a fortiori,* it seems grossly unfair to tax low-income persons like ordinary state troopers for a meal allowance required for their meals while on active duty, when *their* business and personal lives are in effect melded and when the meal allowance system is for the benefit of the State as the employer, rather than the employee.

The common law approach is further reinforced by the announcement of withdrawal of the Discussion Draft. The Internal Revenue Service Notice of December 20, 1976, 1977 CCH Stand. Fed. Tax Rep. ¶6277, stated that, because of "The problems associated with establishing rules of general applicability with respect to fringe benefits":

> "The question of whether fringe benefits result in taxable compensation to employees should continue to depend, as it presently does, on the facts and circumstances that exist in individual situations."

Except for the present case, the application of the convenience of the employer doctrine to state troopers has not been considered by any court for years to which the Internal Revenue Code of 1954 applies, except within the context of Section 119. See *Koerner* v. *United States,* 550 F. 2d 1362 (4th Cir. 1977), *rev'g* 404 F. Supp. 1128 (S.D. W. Va. 1975), *petition for cert. filed,* 45 U.S.L.W. 3754 (May 5, 1977) (No. 76-1539); *Smith* v. *United States,* 543 F. 2d 1155 (5th Cir. 1976), *aff'g* 75-1 U.S. Tax Cas. ¶ 9184, 35 Am. Fed. Tax R. 2d 75-345, (N.D. Miss., Delta Div., No. DC 73-113-K, Nov. 19, 1974), *petition for cert. filed,* 45 U.S.L.W. 3619 (March 7, 1977) (No. 76-1243); *Ghastin* v. *Commissioner,* 60 T.C. 264 (1973); *United States* v. *Barrett,* 321 F. 2d 911 (5th Cir. 1963), *aff'g Barrett* v. *United States,* 205 F. Supp. 307 (S.D. Miss. 1962); *United States* v. *Morelan,* 356 F. 2d 199 (8th Cir. 1966), *aff'g Morelan* v. *United States,* 237 F. Supp. 879 (D. Minn. 1965); *United States* v. *Keeton,* 383 F. 2d 429 (10th Cir. 1967), *aff'g Keeton* v. *United States,* 256 F. Supp. 576 (D. Col. 1966); and *Wilson* v. *United States,* 412 F. 2d 694 (1st Cir. 1969), *aff'g Wilson* v. *United States,* 292 F. Supp. 200 (D.N.H. 1968). Indeed, other than the present case, the application of the convenience of the employer doctrine under Section 61 of the 1954 Code has been mentioned in only one case, and there without citation or enlightening discussion. *Barrett, supra.* Therefore, since the foregoing discussion makes it abundantly clear that the convenience of the employer doctrine is alive and well under the 1954 Code and that Section 119 does not constitute the exclusive application of the doctrine, the cases decided under the 1939 Code must be considered.

The most exhaustive consideration of the application of the convenience of the employer doctrine to state troopers is found in *Saunders* v. *Commissioner, supra,* decided under Section 22(a) of the Internal Revenue Code of 1939,

the predecessor of Section 61 of the 1954 Code. In *Saunders,* the United States Court of Appeals for the Third Circuit held that the meal allowance paid to a trooper of the New Jersey State Police did not constitute gross income. The Tax Court's opinion in the instant case recognizes that *Saunders* involved "circumstances not substantially different from those involved in the instant case." (Pet. App. A, p. 9A) In order to understand the rationale of the *Saunders* holding, it is necessary to place the case in context by reviewing two prior decisions, *Van Rosen* v. *Commissioner,* 17 T.C. 834 (1951), and *Hyslope* v. *Commissioner,* 21 T.C. 131 (1953).

In *Van Rosen,* the Tax Court held that a cash allowance in lieu of subsistence and quarters constituted gross income to a civilian employee of the Army who was employed ashore as master of a vessel undergoing conversion at a shipyard from a cargo ship to a hospital ship. The court's holding was based on its refusal to apply the authority of *Jones* v. *United States, supra,* to any civilian employee. It should be recalled that Treas. Reg. Section 1.61-2(b) now extends to civilians the scope of its exclusion from gross income.

Hyslope was the first case involving a state trooper. In a one paragraph opinion on this point, the Tax Court, without mentioning the convenience of the employer rule, followed *Van Rosen* in refusing to apply the authority of *Jones* to a civilian employee. Therefore, the Tax Court held that a flat monthly sum paid to a state trooper as reimbursement for expenses constituted gross income. Trooper Hyslope was not required to sleep in police barracks, unlike Trooper Kowalski, the respondent in the present case.

Saunders was decided by the Tax Court three months after its decision in *Hyslope,* which was followed without further meaningful discussion. *Saunders* v. *Commissioner,*

21 T.C. 630 (1954). The Third Circuit, relying, among other authorities, on O.D. 514, *supra*, *Jones* v. *United States*, *supra*, and Mim. 6472, *supra*, reversed the Tax Court on the ground that the meal allowance was paid to the trooper for the convenience of his employer, as evidenced by the fact that the payment of the subsistence allowance and the permission granted to the taxpayer to purchase his meals at a public restaurant helped to improve the quality of the New Jersey State Police by allowing troopers to be on patrol at all times and by saving the costs of furnishing meals in kind. The court repudiated the "artificial distinction between 'military' and 'civilian' personnel" and chose to utilize instead the following statement from *Van Rosen* as the criterion for the application of the convenience of the employer doctrine:

> "In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." 17 T.C. at 838, quoted in 215 F.2d at 774-775.

Moreover, the court also rejected any artificial distinction between payment in cash and payment in kind:

> ". . . Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation." 215 F.2d at 771.

Implicit in the opinion was the realization that Trooper Saunders was unable to use his cash meal allowance for any purpose other than its intended use—meals while the trooper was on active duty—since the Tax Court had found that Trooper Saunders had spent at least the amount of his meal allowance for meals while on duty. Similarly, in the present case, the Tax Court found as a fact that the respondent "spent his entire amount of meal allowance received for meals while on active duty." (Pet. App. A, p. 7A.)

In summary, the convenience of the employer rule, which has been recognized both judicially and administratively for more than five decades, holds that the gross income of an employee does not include a meal allowance paid to him by his employer if (i) the allowance is noncompensatory, because it is (a) not intended as compensation and (b) not charged to the salary account, and (ii) the allowance is paid for the convenience of the employer. This doctrine has evolved in the course of defining gross income under Section 61 and its predecessors. It is not dependent on any specific statutory exclusion. Section 119, far from limiting the convenience of the employer rule, mitigates this strict doctrine by providing a statutory safe harbor within which the value of meals and lodging may be excluded from gross income *even if* they are compensatory.

B. The State Police's meal allowance to the respondent falls within the convenience of the employer doctrine.

The petitioner appears to agree with the respondent's position that the convenience of the employer rule imposes

a two-pronged test: (i) the allowance must not be compensatory; and (ii) the allowance must be paid for the convenience of the employer. It must be recognized that, although these two prongs have been separately categorized for purposes of analysis, the two concepts are interrelated. In fact, at least one court has held that the first category—compensation—is subsumed within the second category—convenience of the employer. See *Diamond* v. *Sturr*, 221 F.2d 264 (2d Cir. 1955).

1. The meal allowance paid to the respondent by the State of New Jersey as his employer was noncompensatory.

The Tax Court's findings of fact in this case establish without contradiction that the meal allowance was noncompensatory. The Tax Court found as follows:

> "The meal allowance is paid biweekly in advance and is included, although separately stated, with the trooper's salary which is paid in arrears. The meal allowance money is also separately accounted for in the state police's accounting system. Funds are never co-mingled between the salary and meal allowance accounts. All troopers are entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty. Their salaries increase with their length of service." Pet. App. A, pp. 4A-5A.)
>
> "The meal allowance was not intended to represent additional compensation." (Pet. App. A, p. 5A.)
>
> "State police recruits are told that the meal allowance will be paid to them in cash and is in lieu of of the furnishing of meals they are required to eat while they are on active duty. (Pet. App. A, p. 5A.)

Compensation is a fluid concept. In "Summary and Explanation of Discussion Draft of Proposed Regulations on

Fringe Benefits," *supra*, the Treasury Department approves the following statement:

> "The line between [compensation and conditions of employment] is, perhaps, not susceptible of precise definition. The reason it is not is because the line is really an institutional and sociological one. It depends very much on what our current conception of the relative responsibilities of employer and employee happen to be. The question is whether the benefit in question is one which we regard as a proper responsibility which employers should supply for employees as a condition of employment wholly apart from the compensation for their work. And the answers to that question vary from time to time.
>
> "To the extent that benefits are usually or normally provided by employers, even though they may involve a saving to an employee over alternative methods of providing this facility by himself, then, to that extent the provision of such benefits should not be considered as compensation to the employee but as the provision of improved conditions of work." 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, at pp. 77,374-5.

The same document goes on to say:

> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'." Id. at 77,375. (Emphasis in the original.)

The extensive litigation about police meal allowances reveals that such allowances are commonly regarded as "a proper responsibility" which state police departments "should supply for employees as a condition of employment wholly apart from the compensation for their work." In *Saunders*, it was so held two decades ago in what the trial

court in this case described as "circumstances not substantially different from those involved in the instant case." (Pet. App. A, p. 9A.)

The petitioner's implication (Pet. p. 8; Pet. Br. p. 29) that state troopers are in no different situation from "the majority of working people" (Pet. Br. p. 32) with regard to their conditions of employment appears to be predicated on the convenient omission from his Statement (Pet. Br. pp. 2-7) of all the Tax Court's findings of fact (Pet. App. A, pp. 5A-7A) with respect to the long consecutive hours of strenuous and dangerous duty required of New Jersey state troopers. Unlike "the majority of working people," state troopers are employed by an arm of the State having direct responsibility for enforcement of the criminal law; they are issued firearms by the government; they are billeted in troop barracks; they are subject to court martial and criminal process for failure to perform their duties; they are instructed when and where they may eat; and they are called away from their meals to handle riots and other emergencies involving public safety. They do not have a "lunch hour." It is for these reasons that the court of appeals rejected in *Saunders* the "artificial distinction" (215 F.2d at 775) between military and civilian personnel proposed by the petitioner in that case, and it is for the same reasons that this Court should now reject any similarity between state troopers and 'the majority of working people" proposed by the petitioner in the present case. Since the decision below merely reaffirmed the *Saunders case,* decided in 1950, affirming will in no way "invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses," as petitioner warns (Pet., p. 8).

On the contrary, if this Court rules in favor of the petitioner, it can reach such a decision only on the ground that cash subsistence allowances constitute gross income. Such

a ruling from the Supreme Court of the United States would invalidate Treasury Regulations, Section 1.61-2(b), which excludes from gross income the subsistence and quarters allowances of hundreds of thousands of personnel in the Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States. This, in turn, would subject these allowances to federal income tax, thereby either eroding the benefit to the recipients, with a concomitant loss of morale, or requiring a significant increase in the amount of the allowances in order to give the recipients the same benefit, at enormous expense to the federal government.

It is immaterial that there has not been an individual accounting for meal expenses in the present case for the following reasons:

(i) There are approximately 900 troopers. Their duties cover the entire range of police activity. The State's policy is to rotate the assignments of troopers so as to make each trooper capable of dealing effectively with any type of police problem. The variety of the respondent's duties in 1970 is illustrative of the application of this State policy.

(ii) In these circumstances, the impracticality of providing meals to troopers at meal stations is not only obvious, but also historically proved by the State's abandonment of meal stations in 1949. Moreover, it would be 'an administrative monster to try to keep an accounting of what the men are doing" (Transcript [hereinafter Tr.] 69) and "highly impractical to . . . reimburse for meals after the fact" (Tr. 72).

(iii) Therefore, the State pays a flat subsistence allowance to troopers set at a level regarded as "adequate to feed them . . . on an overall basis" (Tr. 44). The meal allowance paid at the same rate to all state troopers, regardless of

length of service and regardless of the nature of their duties, is an averaging method selected by the State of New Jersy as the most administratively convenient way of providing the troopers with subsistence while on active duty. See Treas. Reg. Section 1.119-1(a)(2)(ii)(e). The allowance was clearly not like salary, for, as the Tax Court found (Pet. App. A, p. 7A), the respondent spent at least the amount of his allowance for meals while on active duty.

In the present case, the Tax Court found as facts that the "meal allowance was not intended to represent additional compensation" (Pet. App. A, p. 5A) and that the meal allowance "is in lieu of the furnishing of meals [the troopers] are required to eat while they are on active duty" (Pet. App. A, p. 5A). These statements constitute findings by the trier of the facts that the taxpayer's meal allowance was noncompensatory.

The hollowness of the petitioner's arguments for treating the meal allowance as compensation is ultimately revealed by his failure to claim that the lodging furnished to taxpayer for 200 nights during the taxable year constituted compensation.

2. The meal allowance was paid to the respondent by the State of New Jersey as his employer for the convenience of the employer.

The Tax Court's findings of fact in this case also establish without contradiction that the meal allowance was provided to the respondent and the other troopers for the convenience of the State Police. On this point, the petitioner's omissions from his Statement are especially egregious. The Tax Court found as follows:

> "Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the state. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the state. Despite various efforts at enforcing this system, it proved unsatisfactory. Troopers would have to leave their posts for approximately an hour and a half to eat these meals leaving their patrol areas unguarded. Efforts aimed at staggering these eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the state discontinued its meal operations and instituted a meal allowance system." (Pet. App. A, pp. 3A-4A.)
>
> "This system provided for a daily meal allowance for all members of the state police while they were on active duty." (Pet. App. A, p. 4A.)
>
> "This system was adopted to provide the state and the public with better police protection. It also proved to be a less expensive method of handling this problem." (Pet. App. A, p. 5A.)

Guidelines as to the circumstances under which meals will be regarded as furnished for the convenience of the employer are provided by Treas. Reg. Section 1.119-1(a)(2)-(ii). Among the circumstances mentioned are the following:

> ". . . when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period . . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(a).
>
> ". . . when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes. . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(b).
>
> ". . . when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period . . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(c).

It is clear from Treas. Reg. Section 1.119-1(a)(2)(ii) that the presence of just one of the foregoing circumstances establishes that meals are furnished for the convenience of the employer. In this case, all of them are present. For example, the Tax Court found:

> "Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. They must first check in with the officier in charge of the station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating and is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept any free meals." (Pet. App. A, p. 5A.)

Moreover, the meal allowance system was adopted because the meal station system was too time-consuming. (Pet. App. A, p. 4A).

Finally, the opinion of the Tax Court states that the respondent's

> "employer, the State of New Jersey, furnished the meal allowance to state troopers because it was more convenient to provide a meal allowance than to provide meals for these troopers . . ." (Pet. App. A, p. 12A.)

The only argument that the petitioner can muster in the face of these findings is the strained argument that, even though the State's entire system of regulating closely the time, place and other circumstances of troopers' meals was adopted for the convenience of the State, the State's convenience was not served by its ultimate act of making payment to the troopers in accordance with the system. If this analysis were valid, Section 119 itself would be a dead letter in its entirety, since every employer would find it more convenient to avoid bearing the cost of furnishing meals and lodging.

In sum, the Tax Court—the trier of the facts—found that the operative facts in this case squarely fit the convenience of the employer doctrine. As Judge Sterrett, the trial judge in the Tax Court, whose dissenting opinion was adopted by the court of appeals, stated:

> "Police are engaged in a unique occupation, one that deals with public safety—a line of work that by its very nature breeds emergencies at any time of day or night. The interests of the employer, the state, in furtherance of its responsibility for the public safety, demand that it require its troopers to eat when, where and for a duration that does not jeopardize the employer's responsibility to the public. The state adopted the meal allowance system to assist it in carrying out this responsibility. Surely this decision is within the employer's prerogative." (Pet. App. A, pp. 35A-36A.)
>
> "It is difficult to conceive of a situation where an employee must so clearly take his meals at the convenience of his employer." (Pet. App. A, p. 36A.)

C. The authorities cited by the petitioner confirm that the convenience of the employer doctrine authorizes the exclusion of a cash meal allowance from gross income.

The petitioner's assertion (Pet. Br., pp. 11-14) that decisions of this Court, particularly *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), preclude application of the convenience of the employer doctrine to this case cannot withstand scrutiny.

In *Glenshaw Glass*, this Court held that punitive damages for fraud and antitrust violations constituted gross income to the recipient on the ground that there was no evidence of Congressional intent to exempt such payments from the broad scope of "income" within the meaning of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the 1954 Code. The case

also held that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope in defining "income." In a similar case decided on the same day, *General American Investors Co.* v. *Commissioner*, 348 U.S. 434 (1955), this Court held that "insider profits" recovered by a corporation under the federal securities laws were includible in the gross income of the corporation on the authority of *Glenshaw Glass*, the Court stating:

> "The reasons which dictated that result are equally compelling here. We see no significant difference in the nature of these receipts which might make that ruling inapplicable. . . . There is no indication that Congress intended to exempt them from coverage." (348 U.S. at 436.)

Far from undermining the authority of *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), these two cases would appear to reinforce its authority by holding that:

> (i) the meaning of the term "income" is the same in both the 1939 Code and the 1954 Code;
>
> (ii) the "nature of [the] receipts" must be examined to determine what constitutes "income"; and
>
> (iii) the Congressional intent must be examined to determine whether a given receipt is to be excluded from "income."

Since "income" has the same meaning in both the 1939 and 1954 Codes, the reasoning of *Saunders* is just as applicable to Trooper Kowalski's meal allowance for 1970 as it was to Trooper Saunders' meal allowance for 1950. Moreover, Congress has expressed in at least two ways its intent to exclude from gross income receipts in the nature of noncompensatory meal allowances paid for the convenience of the employer.

First, since 1920 Congress has repeatedly enacted Revenue Acts and has twice enacted and repeatedly

amended Revenue Codes defining income without limiting the scope of either such administrative rulings at O.D. 514, 2 Cum. Bull. 90 (1920), relating to supper money and quoted in full, *supra*, p. 12, or such cases as *Saunders* v. *Commissioner*, *supra*.

Second, the legislative history of Section 119, enacted in 1954, makes it clear that the taxability of cash allowances for meals continues to require analysis on a case by case basis. As stated above, Congress enacted Section 119 to provide a safe harbor within which meals might be furnished free of tax, even if they were compensatory, so long as the convenience of the employer was served. Congress intended to confine the operation of Section 119 to meals furnished on the business premises of the employer. Cash allowances continue in the position of having to meet both conditions of the judicially and administratively evolved test.

Thus, Congress has clearly evidenced its intent not to limit the common law convenience of the employer doctrine, and the petitioner has repeatedly implemented this policy in his rulings and regulations. The criteria of *Glenshaw Glass* and *General American Investors* have been met.

II.

IN THE ALTERNATIVE, THE MEAL ALLOWANCE PAID TO THE RESPONDENT BY HIS EMPLOYER IS EXCLUDED FROM THE RESPONDENT'S GROSS INCOME UNDER SECTION 119 OF THE CODE, WHICH PROVIDES SUCH AN EXCLUSION FOR (A) THE VALUE OF MEALS (B) FURNISHED BY THE EMPLOYER (C) FOR THE CONVENIENCE OF THE EMPLOYER (D) ON THE BUSINESS PREMISES OF THE EMPLOYER.

If this Court decides that the respondent's meal allowance is not an item of gross income under the convenience of the employer doctrine, as held by the court of appeals, the Court need not consider the application of Section 119 to this case. Section 119 (App., p. 2A) provides a specific exclusion from an employee's gross income for (A) the value of meals (B) furnished by the employer (C) for the convenience of the employer (D) on the business premises of the employer. However, since the petitioner has made an argument under Section 119 (Pet. Br. pp. 34-43), the respondent takes the alternative position that his meal allowance meets the requirements for exclusion from gross income imposed by Section 119.

A. The meal allowance, having been spent by the respondent entirely on meals, constituted the value of meals.

The statutory exclusion in Section 119 is for "the value of any meals." The statutory language does not require that meals be furnished in kind. On the contrary, the phrase "value of meals" would appear to include, in any ordinary meaning of the words, a subsistence allowance. Surely any restaurant patron regards the money that he hands the waiter or cashier after finishing his meal as the value of the meal, at least if he patronizes the restaurant more than once. It is well established, of course, that statutory language is to be read in its ordinary and commonly accepted sense. To treat a subsistence allowance as the value of meals comports not only with the plain language of Section 119, but also with the purpose of Section 119 where, as here, it is demonstrably impractical (if not wasteful and neglectful of the public safety) for the employer to provide meals in kind.

Moreover, if it is shown, as here, that a subsistence allowance is expended solely for meals, any distinction between

the subsistence allowance and the meals themselves for the purposes of Section 119 is artificial. The *Barrett, Morelan, Smith* and *Keeton* cases, *supra,* all held that subsistence allowances provided to state troopers qualify for the exclusion under Section 119, and in all these cases it was established that the subsistence allowances were actually expended for meals. The *Wilson, Koerner* and *Ghastin* cases, *supra,* all held that the subsistence allowances paid to the state troopers in those cases did not qualify for the exclusion of Section 119, but in none of those cases was it established that the subsistence allowance was used exclusively for meals. Although both the regulations and the committee reports that discuss Section 119 state that the Section applies only to meals furnished in kind, these blanket statements are inconsistent with the statutory language and purpose where, as here, a subsistence allowance is the only practical means for the employer to provide its employees with meals required in connection with the employees' duties and where, as here, the subsistence allowance has actually been expended solely for the purpose intended by the employer.

The petitioner's assertion (Pet. Br. p. 37) that the term "value" is not used in the Internal Revenue Code to include cash is not correct. Its inaccuracy is demonstrated by Sections 2031 and 2051 of the Code, defining the gross estate and taxable estate of a decedent solely by use of the term "value" in a context that obviously includes cash. Moreover, Section 107 itself, cited by the petitioner, includes both housing and cash housing allowances under the umbrella of its title "Rental Value of Parsonages". See also Section 102(a), which excludes from gross income "the value of property acquired by gift, bequest, devise, or inheritance."

The irrelevance of former Section 120, repealed in 1958, has been shown previously, *supra,* p. 16.

B. The meal allowance was furnished by the respondent's employer.

Since the respondent's meal allowance was provided to him by his employer, the respondent has met the requirement of Section 119 that the value of meals be furnished by the employer.

C. The meal allowance was furnished for the convenience of the respondent's employer.

The fact that the respondent's meal allowance was provided to him for the convenience of his employer need not be belabored here, since it has been discussed and established earlier in this brief (pp. 26-29).

D. The meals for which the meal allowance was paid were furnished on the business premises of the respondent's employer.

The respondent's meal allowance also meets the statutory requirement that the meals be furnished on the business premises of the employer. It should be noted that this test of clause (1) of Section 119 merely requires that the meals be furnished on the business premises of the employer. This test does not require that the meals be furnished by the employer. It is only the value of the meals that must be furnished by the employer. In the present case, the jurisdiction of the New Jersey State Police, an official arm of the State of New Jersey, extends throughout the entire State. (Pet. App. A, p. 3A) Therefore, as stated in *Barrett*:

> "The Commissioner takes too narrow a view of what constitutes the 'business premises' of the Mississippi Highway Patrol. The major 'business' of this state law enforcement agency is obviously not confined to isolated station houses; rather, it covers every road and highway in the state twenty-four hours a day every day. In view of the special nature

> and functions of the highway trooper's work, it is unrealistic to treat the employer's place of business as limited to the state patrol headquarters. This criterion, therefore, is not decisive against the excludability of the sums here in question." 321 F. 2d at 912.

This interpretation is consistent with the purposes of Section 119, since it would be impractical, expensive and counterproductive to the business of the State Police for the statute to require that meals be furnished to state troopers at meal stations. This interpretation is also consistent with Treas. Reg. Section 1.119-1(c)(1), which provides in relevant part as follows:

> "For purposes of this section, the term 'business premises of the employer' generally means the place of employment of the employee. For example, . . . meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the the employer."

The cowhand example was derived from Conf. Rep. No. 2543, 83d Cong., 2d Sess. 27 (1954), which extended the scope of the example to meals furnished "on national forest land used under a permit". See also *Lindeman* v. *Commissioner*, 60 T.C. 609 (1973), where the Tax Court held that, for purposes of Section 119, the "business premises of the employer" included "the perimeter of the business premises" of the employer. (60 T.C. at 612). A restaurant within the immediate area of a trooper's active duty assignment must surely be regarded as within the "perimeter" of his place of employment.[7]

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7. The question of the definition of the term "business premises of the employer" was not reached in *Ghastin, supra*. In *Wilson, supra*, the court's holding that meals were not furnished on the "business premises of the employer" was apparently based on its finding that the trooper was off duty while eating. In the present case, the taxpayer was on active duty during meals, and he was responsible for general law enforcement, not merely traffic patrol.

The petitioner argues (Pet. Br. p. 35) that the requirements of Section 119 as to the form in which meals are provided—cash or kind—and the place where meals are provided—the employer's business premises—are interrelated in order to "keep the employees close to their assigned work place and promote greater efficiency." If this purpose can be served only by providing a cash meal allowance to be expended at a public restaurant, the statutory purpose can be served only by excluding such an allowance from the employee's gross income. State police officers are not clerical employees who are given a lunch hour to be devoted to personal pursuits of the employee's choice, whether eating, shopping or just loafing. State police officers are continuously on duty. The New Jersey State Police does not permit troopers' meals to interfere with the performance of their duties. New Jersey State Police Troopers eat only when and where they are given specific permission to do so—often at a roadside diner in the middle of the night. The State of New Jersey instituted its meal allowance system precisely to avoid loss of time in traveling to and from meals. (Pet. App. A, p. 4A.)

The petitioner's contention in this case that the respondent's meal allowance cannot be excluded from gross income under either the convenience of the employer doctrine embodied in Section 61 or the safe harbor provisions set forth in Section 119 is not tenable. On one hand, the petitioner postulates that the convenience of the employer doctrine has been confined exclusively to Section 119 since its enactment as part of the Internal Revenue Code of 1954. On the other hand, he premises that cash allowances cannot qualify for exclusion from income under Section 119. The logically necessary conclusion from these premises is that cash allowances cannot qualify for exclusion from income under any circumstances. Yet, petitioner's own rulings (*e.g.*, O.D. 514. 2 Cum. Bull. 90) and Treasury Regulations [Sections 1.61-

2(b) and 1.119-1(c)(2)] provide for the exclusion of cash meal allowances. Moreover, there is nothing in the legislative history of Section 119 to suggest that cash meal allowances cannot qualify for exclusion from income. To the contrary, the Senate Finance Committee Report cited and quoted by petitioner (Pet. Br. p. 10) makes it clear that cash meal allowances received by an employee are "includible in gross income only to the extent that such allowances constitute compensation." S. Rep. No. 1622, *supra*, pp. 190-191. Since petitioner's argument defeats itself, the court of appeals' analysis of the law applicable to this case is irrefutably correct, unless the respondent alone is to be given full authority to construe the Internal Revenue Code.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Respondent also requests an award of attorney's fees pursuant to 42 U.S.C. Section 1988, 90 Stat. 2641.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. **Gross Income Defined**

(a) **General Definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

(b) **Cross References.—**

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

SEC. 119. **Meals or Lodging Furnished For the Convenience of the Employer**

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if:

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.61-2 Compensation for services, including fees, commissions, and similar items

(a) In general. (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination of severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

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(b) Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service. Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. • • •

Sec. 1.119-1 Meals and lodging furnished for the convenience of the employer

(a) Meals—(1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) Meals furnished without a charge. (i) Meals furnished by an employer without a charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the

meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances. In subdivision (ii) of this subparagraph, there are set forth some of the substantial noncompensatory business reasons which occur frequently and which justify the conclusion that meals furnished for such a reason are furnished for the convenience of the employer. In subdivision (iii) of this subparagraph, there are set forth some of the business reasons which are considered to be compensatory and which, in the absence of a substantial noncompensatory business reason, justify the conclusion that meals furnished for such a reason are not furnished for the convenience of the employer. Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer, but see subdivision (ii) (d) and (f) of this subparagraph for some exceptions to this general rule. Meals furnished on nonworking days do not qualify for the exclusion under section 119. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meal furnished without charge to the employee on such premises.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer

when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(b) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak workload occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (b) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(c) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (c) when there are insufficient eating facilities in the vicinity of the employer's premises.

(d) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a sub-

stantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(e) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employee will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(f) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

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(c) **Rules**. (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals and lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

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